Clarifying the Role and Responsibilities for Aboriginal Consultation and Accommodation Within DND/CF

By LCdr Ken Osborne DND/CFLA LAS

November 18, 2006, marks the second anniversary since the Supreme Court of Canada released its decision in *Council of the Haida Nation* v. *British Columbia*[1] and the related case of *Taku River Tlingit First Nation* v. *Minister of Forests*[2]. These unanimous decisions provided much needed clarification of the duties of consultation and accommodation in respect of government decisions, which may impact asserted aboriginal rights. In both cases, the Court recognized that the duty of governments to consult with, and where appropriate, to accommodate the interests of Aboriginal peoples can arise before claims of aboriginal rights and title are determined. The source of this duty, the Court noted, is the "honour of the Crown".

In the two years since these decisions, Aboriginal peoples have begun to identify the need for consultative processes that meet the Crown's obligations to consult and respect aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*. In some cases, these decisions have provided the framework for Aboriginal groups to seek "de facto moratoriums" on initiatives that are moving forward in the absence of effective aboriginal consultation.[3] As a practical consequence, these decisions are forcing the Crown to be proactive in its consideration of the "aboriginal perspective" when evaluating the potential affects of its land use decisions. [4]

This paper will serve to provide the reader with an overview of the main elements of the Supreme Court of Canada's decisions of *Haida Nation* and *Taku River*. It is a refresher on the duty of consultation and accommodation in the face of asserted claims for aboriginal rights and title. Since DND/CF utilizes significant tracts of land to achieve its defence and operational mandate, legal officers, and particularly DJAs, will be called upon to advise on the nature and scope of the Crown's duty to consult and, if necessary, accommodate the concerns of Aboriginal groups before Base/Wing decisions on land use are made.

Background

Haida Nation and *Taku River* arose out of disputes between the Province of B.C. and two First Nations – the Haida Nation and the Taku River Tlingit First Nation ("TRTFN"). In *Haida Nation* the Band challenged B.C.'s decision to transfer a Tree Farm License to harvest trees on Crown land from one forestry firm to another in an area asserted to be Haida traditional territory. In the second case, the TRTFN objected to the Province

[1] [2004] 3 S.C.R 511 ["*Haida Nation*"]
[2] [2004] 3 S.C.R 550 ["*Taku River*"]
[3] see for example Ottawa Citizen Article "Natives Must Have a Say in Land Development: Judge Native Official Calls Ruling 'Amazing'; Mining Firm Fears Broad Implications" dated 1 August 2006.
[4] see for example Ottawa Citizen Article "Natives Say 'Hold The Train' Algonquins Make Land Claims On Line" dated 25 July 2006.

granting project approval under the *Environmental Assessment Act* to build a road through a portion of the TRTFN's traditional territory. In this case the TRTFN had been involved in B.C.'s environmental assessment process.

In both cases, the First Nations argued that their rights to traditional territory were being adversely affected by the Province's project decision. In each case, the First Nations were asserting rights to their traditional territory. At the time of the Province's action, no decision had been rendered on whether the asserted rights were recognized under section 35 of the *Constitution Act, 1982*. Both Aboriginal groups took the position that the Province acted without consent and in a manner that threatened to render their asserted rights meaningless. B.C. took the position that it had no legal duty to consult with the First Nation until such time as aboriginal or treaty rights were established.

In both instances, the B.C. Court of Appeal found that the Province had failed to meet its duty to consult with the affected First Nations. In *Haida Nation*, the court went further and noted that the third party corporation shared a duty with the Province to consult and accommodate the Haida in respect of the issuance of the harvesting licence. This aspect of the Court of Appeal's decision was particularly controversial. Both decisions were appealed to the Supreme Court of Canada and marked the first occasion that the Court would address the obligations on the Crown in a situation where the aboriginal interest was insufficiently specific to trigger the Crown's fiduciary duty to Aboriginal peoples.

The Source of the Crown's Duty to Consult and Accommodate

In *Haida Nation* the Supreme Court of Canada found that the government's duty to consult with Aboriginal peoples and to accommodate their interests, if necessary, is grounded in the "honour of the Crown".[5] As a core precept, the Crown's honour permeates all aspects of the Crown's interactions with Aboriginal peoples. Referring specifically to its decision in *R*. v. *Badger*, the Court noted that the honour of the Crown is always at stake in its dealings with Aboriginal peoples.[6] For example, where the Crown has assumed a discretionary control over specific aboriginal interests (i.e. reserve lands), the honour of the Crown gives rise to a fiduciary duty.[7]

In *Haida Nation* the Court was quite clear to distinguish between the Crown's obligations pursuant to a fiduciary duty over specific aboriginal interests and the more general duty to consult and accommodate when those interests have not fully crystallized. The Court affirmed its principle in *Wewaykum Indian Band* that the Crown's fiduciary duty to Aboriginal peoples does not exist at large but in relation to a specific aboriginal interest.[8] In the context of an asserted, but not yet proven claim, the duty to consult and accommodate Aboriginal peoples is not found within an overarching trust relationship.

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[5] *supra* note 1
[6] *R*. v. *Badger*, [1996] 1 S.C.R. 771 at para 41 and *supra* note 1 at para 16.
[7] *Wewaykum Indian Band* v. *Canada*, [2002] 4 S.C.R. 245. at para 79
[8] *Ibid*.

The concept of "honour" is derived from the historical recognition that Canada's Aboriginal peoples were never conquered when Europeans asserted sovereignty over them.[9] The resolution of claims between the two peoples was historically achieved through treaties. Therefore, where treaties remain to be concluded, the honour of the Crown requires negotiations leading to the just settlement of claims.[10] In essence, section 35 of the *Constitution Act, 1982* represents a modern manifestation of the promise of rights recognition through a process of honourable negotiation.[11] This implies a duty to consult and, if necessary accommodate aboriginal interests as a corollary to the honourable process demanded by section 35.[12]

Asserted Rights Can Trigger Consultation Obligations

In both *Haida Nation* and *Taku River*, the Court held that the obligation to consult does not simply arise upon the proof of an aboriginal claim and only for the purpose of justifying an infringement. Asserted aboriginal rights can also impose an obligation upon government to consult and accommodate the Aboriginal group, if necessary.[13] The threshold triggering these obligations is quite low. The Crown must consult whenever the government has "knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it."[14] This in turn may lead to a duty to change government plans or policy to accommodate aboriginal concerns.[15]

This low threshold means that consultation may be necessary in most cases where the Crown proposes to act in a manner that adversely affects aboriginal interests. The Court's intention in establishing such a threshold ensures that the Crown acting within its aegis of sovereignty does not "cavalierly run roughshod over aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiations and proof."[16] Triggering the duty to consult early serves to reconcile aboriginal interests with the general public interest underlying the proposed action and protects asserted aboriginal claims from being rendered meaningless prior to their resolution.

Scope of the Duty is Proportionate to the Impact of the Decision

In setting out the scope and content of the Crown's consultation and accommodation duty, the Court did not set out a bright line test. Rather, it noted that the scope and content of the duty would vary depending upon the circumstances of the case. To a certain extent, this principled approach offsets the Court's imposition of a low threshold for triggering the duty of consultation and accommodation and permits the consideration

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[9] *supra* note 1 at para 25
[10] *Ibid*. at para 20
[11] *Ibid*. at para 20
[12] *Ibid*. at para 20 and 38
[13] *supra* note 2 at para 22
[14] *supra* note 1 at para 35
[15] *supra* note 2 at para 25
[16] *supra* note 1 at para 27

of the Aboriginal group's concern along a sliding scale of procedural entitlements that are dependant upon the strength of the asserted claim.

In *Haida Nation*, the Court said "that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed".[17] If the claim is weak or the potential for infringement is minor, the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response to the notice. If the claim is strong, the potential infringement significant and the risk of non-compensable loss is high, deep consultation and possibly accommodation will be required.

In all cases of consultation, the Court held that government responsiveness is paramount.[18] The honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate for the circumstances.[19] The Crown must be proactive and embark upon consultation after a full assessment of the strength of the aboriginal claim. In discharging its duty to consult, the Court noted that regard might be had to the procedural safeguards of natural justice mandated by the principles of administrative law.[20] Therefore, genuine consultation may mean a process that involves any of the following activities:

a. notice to affected aboriginal groups;

b. gathering information to test policy proposals;

c. disclosure of information;

d. seeking aboriginal opinion on the proposal;

e. informing aboriginal groups of all the relevant information upon which the proposal is based;

f. listening with an open mind and being prepared to alter the original proposal before a decision is made;

g. providing feedback during the consultation process; and

h. offering reasons for a decision, if necessary.

It is important to note that consultation is not automatically coupled with accommodation. Accommodation is separate outcome connected to the Crown's obligation to act honourably. The duty to accommodate may be revealed through the

[17] *Ibid* at para 39
[18] *supra* note 2 at para 25
[19] *supra* note 1 at para 41
[20] *Ibid* at para 41

Crown's consultation activity. The Crown arrives at the stage of accommodation when the consultation process requires the Crown to consider amendments to its proposed activity.[21] The need for accommodation will be most apparent where a strong *prima facie* case exists for the aboriginal claim, the consequences of the government's proposed decision will adversely affect that claim in a significant way, and steps are needed to avoid or minimize the irreparable harm.

Government Can Create Consultation Processes

A significant aspect in these decisions was the Court's recognition that the Crown can determine how aboriginal consultation can be carried out. In *Taku River*, the Court noted that the statutory consultation process set up under the B.C. *Environmental Assessment Act*, which required the participation of the TRTFN as an affected group, was adequate to address the Crown's duty in that case.[22] It is open to governments to set up regulatory schemes to address procedural mechanisms appropriate for addressing the requirements of consultation and accommodation at various stages in the decision-making process. What government cannot do, the Court cautioned, "is simply …adopt unstructured discretionary administrative regimes which risk infringing aboriginal rights". [23] These regimes have been found to impose undue hardship and interfere with the preferred means of exercising aboriginal interests on land.[24]

Aboriginal Groups Do Not Have a 'Veto'

Since no fiduciary duty exists in a situation where an aboriginal right or title is asserted but not yet proven, the Court clarified in *Haida Nation* and *Taku River* that resource management decisions do not need to be solely based on the best interests of the Aboriginal group. It is sufficient simply that the Crown seeks to balance the aboriginal interest with the public interest served by the proposed initiative. Therefore, unlike a situation where aboriginal rights are established, aboriginal "consent" to engage in the specific activity is not required.

In fact, the Court was quite clear in their decision that the process of consultation does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.[25] Rather the process serves to harmonize conflicting interests in an effort to move toward reconciliation. [26] Aboriginal groups must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions.[27] To facilitate the process, the Court encourages Aboriginal groups to share their concerns with the Crown so that they may be attended too prior to the decision being made. So long as reasonable good faith efforts are used to

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[21] *Ibid* at para 47
[22] *supra* note 2 at para 39
[23] *supra* note 1 at para 51 referring to *R* v. *Adams*, [1996] 3 S.C.R. 101.
[24] *R.* v. *Adams*, [1996] 3 S.C.R. 101
[25] *supra* note 1 at para 49
[26] *Ibid* at para 49
[27] *Ibid* at para 41

understand and address each other's concerns, courts will not object to the process even if the Aboriginal group is unwilling to support the initiative. [28]

Who is the Crown?

The ultimate responsibility for consultation and accommodation, when federal action is involved rests with the federal Crown. This applies equally to the provinces in respect of any action taken pursuant to their jurisdiction. Since individual federal departments are responsible for the implementation of their respective public mandates, this means that DND/CF has the responsibility to consult with potential aboriginal rights-holders when a proposed decision by DND/CF may affect asserted rights and title. Since departments may pursue their respective mandates jointly and with the involvement of the provinces, the obligation to consult may be shared.

The challenge affecting the Crown's duty to consult and accommodate is obvious. Aboriginal groups do not recognize disparate departments and levels of governments as anything other than the "Crown". Consistency of consultative and accommodation practises across Canada, particularly how such practises are to be funded and conducted, represents the single greatest challenge to implementing the principles set out by the Court in *Haida Nation* and *Taku River*.

In matters requiring an assessment of the Crown's duty to consult, legal officers must be aware that a high degree of coordination, cooperation and information sharing across DND/CF and other departments may be needed. In some cases, the Department of Justice[29] and the Department of Indian Affairs and Northern Development will need to be involved. Since DND/CFLA Legal Advisory Services (LAS) provides legal support to DND/CF on all aboriginal matters, LAS should also be contacted as a source for support in the determination of consultation and accommodation requirements.

Duty to Consult Does Not Extend to Third Parties

Though the B.C. Court of Appeal sought to extend the duty of consultation and accommodation to a forestry company, the Supreme Court of Canada found no scope to extend these duties beyond the Crown. The source of the Crown's obligation, flows from its assumption of sovereignty over the lands and resources formerly held by Aboriginal groups and this assertion provides no support for extending the obligation to third parties.[30] Though the Crown may delegate procedural aspects of consultation to industry proponents (e.g. environmental assessments), the Crown alone remains legally responsible for the consequences of its action and interactions with third parties.[31] The fact that third parties are under no duty to consult or accommodate aboriginal concerns

[28] *supra* note 2 at para 47
[29] To address the issue of consistency the Department of Justice has created a centralized "Consultation Secretariat" to coordinate consultative best practises and to provide general guidance on aboriginal consultation strategies.
[30] *Haida Nation* para 53.
[31] *Haida Nation* para 53.

does not mean they can never be liable to Aboriginal peoples (e.g. in either negligence or contract).[32] However, they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

Affect on DND/CF Land Use

Without question, land use by DND/CF is an important feature in achieving its operational and defence mandate. DND/CF utilizes about 18,000 square kilometres of land to train its personnel, soldiers from other countries and to test its munitions. To be effective, DND/CF must work closely with all affected landholders, including Aboriginal groups. The decision of *Haida Nation* and *Taku River* will have a significant impact on how DND/CF manages and utilizes its land holding as well as how it exercises its authority over land where aboriginal interests are implicated. In particular, *Haida Nation* and *Taku River* may affect all of the following land use decisions where DND/CF has real or constructive knowledge of the potential existence of aboriginal rights or title affecting the land it proposes to use:

a. Ministerial authority to authorize "manoeuvres" under section 257 of the *National Defence Act*;

b. the entering into and renewal of leases affecting DND/CF property;

c. access decisions to Bases or Wings made pursuant to Defence Controlled Area Access Regulations (DCAARs);

d. priority for the harvesting of resources on land controlled by DND/CF;

e. the planning of training activities in controlled access sites where aboriginal rights are also asserted;

f. the acquisition of lands for specific military purposes (e.g. radar installations, bases); and

g. the strategic disposal of surplus DND/CF property.

Conclusion

The Supreme Court of Canada's decisions in *Haida Nation* and *Taku River* are an affirmation that the Crown owes Canada's Aboriginal peoples a substantive duty to treat their interests fairly, seriously and in the spirit of reconciliation. The doctrine of consultation and accommodation is not a modern innovation crafted for the purpose of fettering the Crown's ability to govern absolutely. The government's duty to consult with Aboriginal peoples and to accommodate their interests, if necessary, is firmly rooted in a traditional principle of the Crown's honour, a concept crystallized when European sovereignty was asserted over Aboriginal peoples. In short, both decisions explicitly

[32] *supra* note 1 at para 56.

recognize the pre-existence of aboriginal societies and the Crown's obligation to govern with considered regard as to how land use decisions will affect aboriginal interests.

The Office of the Canadian Forces Legal Advisor/ Legal Advisory Services (DND/CFLA LAS) remains ready to assist DND/CF and Legal Officers with the provision of advice on the nature, scope and impact of these decisions on DND/CF.